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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972
No. 72-840

BYRON LIND,
Guardian ad litem of Jay S. Rogers, Incompetent,
Petitioner,
vs.
ROBERT F. HALE,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the District Court of Appeal
In and for the Second District of Florida

R. CLARK ROBINSON of HARRIS,
CLARK, GREEN, PIPER & ROBINSON
303 West Coast Title Building
St. Petersburg, Florida 33701
Attorneys for Respondent

WARREN A. GIBSON
RAYMOND A. GRAHAM
800 S. Orange Avenue
Sarasota, Florida 33577
Attorneys for Petitioners

CHARLES W. BURKE
Suite 416, First Federal Building
St. Petersburg, Florida 33701
Administrator and attorney for
Estate of Maxine C. Rogers, deceased

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO.

RESPONDENT'S BRIEF IN OPPOSITION TO
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Respondent prays that the Petition for Writ of Certiorari applied for in this cause be denied.

JURISDICTION

Petitioners have failed to comply with Rule 23 1.(f) of the Supreme Court rules inasmuch as they have failed timely and properly to raise and preserve any federal question for review by their Petition for Writ of Certiorari to this Honorable Court.

STATEMENT OF CASE

Respondent basically agrees with the statement of case as presented by Petitioners and would note only one additional matter; that, in fact, Charles W. Burke also appeared as counsel of record for Jay S. Rogers.

ARGUMENT

Respondent would show that this is not a proper matter for review by this court because:

I. No federal question exists as Jay S. Rogers was not deprived of due process of law during the proceedings in this cause.

II. The federal question of denial of due process of law to Petitioner was not properly raised and preserved for review by this Court.

I.

It is contended by counsel for Petitioners that Jay S. Rogers was denied due process of law because he was not represented at pretrial conference held on May 5, 1971, nor represented at the trial on May 11, 12, 13 and 14, 1971.

However, the record is clear that not only did Charles W. Burke represent Hazel Huff Rogers, the mother of the decedent, and, ultimately, the personal representative of her estate, who was Gail Rogers, Petitioner's son, as well as appearing as attorney for the Estate of Maxine C. Rogers and as personal representative for that estate, but he likewise represented Jay S. Rogers at the pretrial conference and during the time of trial.

This fact is made apparent by the Notice of Withdrawal of Counsel filed by Charles W. Burke on July 2, 1971, see Appendix "A"; and by the order of the trial court appointing Warren W. Gibson and Raymond A. Graham, as attorneys on behalf of Petitioners, dated July 1, 1971, see Appendix "B".

All parties material hereto were given Notice of Pretrial Conference and Notice of Trial on April 16, 1971, see Appendix "C".

According to Petitioners' Appendix E-1,

Report of Referee, incompetency hearing was not held until May 4, 1971, at which time no written order was filed either declaring Jay S. Rogers incompetent or appointing a guardian. Indeed, it was not entered until June 29, 1971, when the appropriate Ohio state court entered its Journal Entry and appointed Byron D. Lind, the son-in-law of Jay S. Rogers, as his guardian. It should be noted that this was done just one day before the petition to vacate judgment was entered in the trial court, Petitioners' Appendix "F".

The form of the Journal Entry is also somewhat unusual, as it attempts to make the declaration of incompetency of Jay S. Rogers retroactive to May 4, 1971, see Appendix "D".

Even discounting all of the family inter-relationships involved and the somewhat unorthodox order entered in regard to the incompetency of Jay S. Rogers, it is obvious from the record that

Jay S. Rogers was represented by counsel of record, Charles W. Burke, at all pertinent times throughout the litigation. Therefore, to state that he was denied due process of law is incomprehensible.

II.

The only mention made of a federal question, i.e., the denial of due process of law of one, Jay S. Rogers, was raised in a petition to the trial court to vacate the court's final judgment declaring Robert F. Hale to be the common-law husband of Maxine C. Rogers, deceased, see Petitioners' Appendix "F". Said petition contains over fifteen counts, only one of which even mentions a federal question.

It was the first time in which it was suggested to the trial court or to counsel of record that Jay S. Rogers had been adjudged incompetent and that anyone other than Gail Rogers had been appointed as guardian.

This was the last time that a Florida court

was to see mention of a federal question. There was no mention made of denial of due process in the assignments of error duly presented to the District Court of Appeal, Second District of Florida, on behalf of the Petitioners nor was there any mention of lack of due process of law to the Supreme Court of the State of Florida when their Petition for Writ of Certiorari was denied on September 19, 1972.

Therefore, the appeal courts of the State of Florida were never called upon by the Petitioners to pass upon the federal question which they are now attempting to have this Honorable Court review.

Respondent believes that, if indeed a federal question was raised by one of Petitioners' counts in their petition to vacate submitted to the trial court, their failure to assign said question as error to the appellate courts of the State of Florida should be deemed a waiver of the question. Beck v. Washington (1962) 82 S.Ct. 955; 369 U.S. 541; 8 L.Ed.2d 98.

The timeliness with which the federal question is to be raised in the state court is critical. This is largely a matter for the state to regulate by its procedural rules. Failure to raise the question at the stage of the proceedings required by state law will preclude review. Edelman v. California (1953) 73 S.Ct. 293; 344 U.S. 357; 97 L.Ed. 387.

Procedurally, the State of Florida provides that, before the Florida Supreme Court will take jurisdiction of a case on the ground that a final judgment or decree has construed a Florida or federal constitutional provision, at least four prerequisites must exist.

1. The question must have been raised at the first opportunity;

2. The constitutional provision claimed to be violated must have been designated specifically either by explicit reference to the article and section or by quotations of the provision itself;

3. The facts showing a violation must have been stated; and

4. The constitutional question must have been preserved throughout.

Hall v. Strickland (1965 Fla.) 170 So2d 827; International Hod Carrier v. Heffler Const. Co. (1959 Fla.) 112 So2d 848.

It is evident from the entire record of the proceedings that these four prerequisites for judicial review have not been complied with in this case.

Wherefore, Respondent respectfully requests this court to enter its order denying the Petition for Writ of Certiorari.

Respectfully submitted,

R. CLARK ROBINSON
HARRIS, CLARK, GREEN, PIPER & ROBINSON
Attorneys for Respondent

APPENDIX A

IN THE COUNTY JUDGE'S COURT PINELLAS COUNTY FLORIDA

FILE NO. 61,962

IN RE: ESTATE OF)
MAXINE C. ROGERS) NOTICE OF WITHDRAWAL OF COUNSEL
DECEASED.)

TO: GAIL ROGERS as Executor of the Estate of Hazel Hoff Rogers, Deceased, JAY S. ROGERS, and BYRON LIND as Guardian ad litem for Jay S. Rogers, Incompetent
c/o Graham and Gibson
Attorneys at Law
800 S. Orange Avenue
Sarasota, Florida

ROBERT F. HALE
c/o R. Clark Robinson, Esquire
Harris, Clark, Green, Piper & Robinson
303 West Coast Title Building
St. Petersburg, Florida 33701

Please be advised that, pursuant to the order of the Honorable David Seth Walker, County Judge, entered the 1st day of July, 1971, I hereby withdraw as counsel of record for Gail Rogers as Executor of the Estate of Hazel Hoff Rogers, deceased, and for Jay S. Rogers, and for Byron Lind as Guardian ad litem for Jay S. Rogers, Incompetent.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Notice of Withdrawal of Counsel has been served upon the individuals named above at the addresses indicated by regular United States mail this 2nd day of July, 1971.

/S/ Charles W. Burke
CHARLES W. BURKE
Attorney at Law
416 First Federal Building
St. Petersburg, Fla. 33701

APPENDIX B

IN THE COUNTY JUDGE'S COURT, PINELLAS COUNTY, FLA.

FILE NO. 61-692

IN RE: ESTATE OF)

MAXINE C. ROGERS)

DECEASED)

ORDER

This cause was heard on July 1, 1971, upon the Petition of Gail Rogers, Executor and Byron Lind, Guardian to substitute Byron Lind, Guardian of Jay S. Rogers, incompetent as a party in this cause in his representative capacity as guardian of Jay S. Rogers, or in the alternative to appoint a Guardian ad litem for the said incompetent and to substitute Warren W. Gibson and Ray Graham in lieu of Charles W. Burke as attorneys of record in this cause for Gail Rogers, Executor, Jay S. Rogers and his Guardian or Guardian ad litem.

It appearing that Jay S. Rogers has been duly adjudicated non compos mentis by the Summit County, Ohio Probate Court, that being the place of his domicile, that Byron Lind has been duly appointed qualified as the Ohio Guardian of the said Jay S. Rogers, incompetent, and that Charles W. Burke is desirous of withdrawing as attorney of record and Warren W. Gibson and Ray Graham are desirous of appearing as attorneys of record for the aforementioned Executor, for Jay S. Rogers, incompetent and his Guardian and Guardian ad litem, it is therefore,

ORDERED and ADJUDGED:

1. Byron Lind is appointed as Guardian ad litem for Jay S. Rogers, incompetent and made a party to this cause in his representative capacity as Ohio Guardian of Jay S. Rogers and Guardian ad litem for Jay S. Rogers; oath of Guardian ad litem to be filed forthwith.

2. Charles W. Burke is permitted to withdraw as attorney of record for Gail Rogers, Executor of Hazel Huff Rogers and for Jay S. Rogers and his Guardians;

3. Warren W. Gibson and Ray Graham are hereby substituted as the attorneys of record for Gail Rogers, Executor of Hazel Huff Rogers, for Jay S. Rogers, incompetent and for Byron Lind as the foreign Guardian and Guardian ad litem of the said Jay S. Rogers.

DONE and ORDERED at St. Petersburg, Florida, on July 1, 1971.

/S/ David Seth Walker
COUNTY JUDGE

APPENDIX C

IN THE COUNTY JUDGE'S COURT PINELLAS COUNTY FLORIDA

Probate No. 61,962

IN RE ESTATE OF)

MAXINE C. ROGERS)

DECEASED)

NOTICE OF PRETRIAL CONFERENCE AND FINAL HEARING

TO:

Honorable Charles W. Burke
416 First Federal Building
St. Petersburg, Florida

Mr. Jay S. Rogers
824 Falls Avenue
Cuyahoga Falls, Ohio

Gail Rogers as Executor of
the Estate of Hazel Hoff
Rogers and Guardian of
Jay S. Rogers, 10462 Page
Road, Streetsboro, Ohio

Mr. Melvin Penn
702 Aberdeen Circle, Tampa,
Temple Terrace, Florida

You will please take notice that a pretrial conference in the above-styled matter has been scheduled for May 5, 1971, at 2:30 p.m., and the Final Hearing on Amended Petition for Revocation and Granting of Letters of Administration has been scheduled for May 11, 1971, beginning at the hour of 2:15 p.m., before the Honorable David S. Walker, County Judge, in Chambers, at the Judicial Building, St. Petersburg, Florida, or as soon thereafter as counsel may be heard.

YOU MAY GOVERN YOURSELVES ACCORDINGLY.

I HEREBY CERTIFY that copy of the foregoing Notice has been furnished to the above-named addressees this 16th day of April, 1971.

HARRIS, CLARK, GREEN, PIPER & ROBINSON

By: /S/ R. Clark Robinson
R. Clark Robinson
Suite 303 West Coast Building
St. Petersburg, Florida 33701
Attorneys for Petitioner

APPENDIX D

IN THE COURT OF COMMON PLEAS PROBATE DIVISION
SUMMIT COUNTY, OHIO

IN THE MATTER OF THE	)	CASE NO. 34,302
GUARDIANSHIP OF	)	Doc. 44, page 141
JAY S. ROGERS,	)	JUDGMENT ENTRY
as incompetent	)	Filed June 29, 1971

This cause came further on to be heard this 29th day of June, 1971, upon the oral application to the court to change the suggested guardian for said ward from Ardene R. Lind to Byron D. Lind.

For good cause shown, the court finds that it is to the best interest of said ward that the said Ardene R. Lind be not appointed and all parties in interest have agreed that the best interest of said ward would be served by appointing Byron D. Lind, son-in-law of said ward and husband of said Ardene R. Lind as such Guardian. It has been represented to the Court that said ward is permanently now living in the home of the said Byron D. Lind and that, as such Guardian, the said Byron D. Lind is well able to serve the best interest of said ward in maintaining his care and support and providing for his general welfare.

The Court had previously determined at the hearing on May 4, 1971, that the said Jay S. Rogers was an incompetent person by reason of advanced age and mental and physical infirmity and that a Guardian was necessary.

IT IS, THEREFORE, Ordered that the said Byron D. Lind may be forthwith appointed as such Guardian upon giving proper bond.

/S/ Nathan Koplin
JUDGE

APPROVED:

/S/ Robert H. McDowall
Robert H. McDowall, atty. for
First National Bank

/S/ Ward W. Davis
Ward W. Davis, atty. for
Byron D. Lind